No. 88-2041

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1988

**IN THE MATTER OF:**
**The Complaint of EVERETT A. SISSON, as owner of the motor yacht the ULTORIAN, for exoneration from or limitation of liability,**

**EVERETT A. SISSON,**

*Petitioner,*

v.

**BURTON B. RUBY, FIREMAN'S FUND INSURANCE COMPANY, and PORT AUTHORITY OF MICHIGAN CITY, Claimants,**

*Respondents.*

**On Writ Of Certiorari To The United States Court of Appeals For The Seventh Circuit**

## BRIEF ON THE MERITS BY PETITIONER EVERETT A. SISSON

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## QUESTIONS PRESENTED

1. Whether a fire on board a non-commercial vessel docked at a recreational marina on navigable waters bears a significant relationship to traditional maritime activity in order to bring it within the admiralty and maritime jurisdiction of the District Court pursuant to 28 U.S.C. §1333 and Article III, Section 2, of the Constitution.

2. Whether the Limitation of Liability Act 46 U.S.C. §181 *et seq.* provides a source of admiralty jurisdiction separate and apart from jurisdiction under 28 U.S.C. §1333.

3. Whether this Court should reconsider its decision in *Richardson v. Harmon*, 222 U.S. 96 (1911).

## LIST OF PARTIES

The parties to the proceedings below were Everett A. Sisson, owner of the motor yacht the M/V ULTORIAN and the Respondents Burton B. Ruby, Fireman's Fund Insurance Company, Port Authority of Michigan City, Continental Insurance Co., Cincinnati Insurance Co. and John P. Walther as claimants in the limitation proceeding. Marine Office of America Corporation and Roger Dillon were also claimants in the limitation proceeding, but were not parties to the proceedings before the United States Court of Appeals for the Seventh Circuit.



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## BRIEF ON THE MERITS BY PETITIONER EVERETT A. SISSON

## OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported at 867 F.2d 341 (7th Cir. 1989), and is reprinted in the Petitioner's Appendix to his Petition

for Certiorari at 1a, *infra.** The order of the Court of Appeals for the Seventh Circuit denying Petitioner's petition for rehearing is reported at *In Re Complaint of Sisson*, 1989 U.S. App. Lexis 4041 (7th Cir. 1989) and is reprinted in the Pet. App. 22a. The order of the United States District Court for the Northern District of Illinois is reported at 663 F. Supp. 858 (N.D. Ill. 1987), and the order denying the motion for reconsideration is reported at 668 F. Supp. 1196, (N.D. Ill. 1987) and are reprinted in the Pet. App. 25a and 37a respectively.

## JURISDICTION

The Petitioner invoked federal jurisdiction under 28 U.S.C. §1333 in the United States District Court for the Northern District of Illinois Eastern Division. The Petitioner also based jurisdiction on the Limitation of Liability Act 46 U.S.C. §181 *et seq.* On July 1, 1987, the district court dismissed Petitioner's complaint for lack of subject matter jurisdiction which dismissal was affirmed on rehearing on September 25, 1987.

On Petitioner's appeal, the Seventh Circuit affirmed the district court on January 24, 1989, finding that there was no subject matter jurisdiction. On March 16, 1989, the Seventh Circuit Court of Appeals denied a Petition for Rehearing with suggestion for rehearing en banc. The Petitioners seek review of the decisions of the Seventh Circuit.

* The parties have agreed that the Appendix included in Petitioner's Brief for Certiorari will stand as the Joint Appendix.



The jurisdiction of this Court to review the judgment of the Seventh Circuit is invoked under 28 U.S.C. §1254(1). On January 22, 1990 this Court granted Certiorari.

## CONSTITUTIONAL PROVISIONS INVOLVED

**Article III, Section 2, Of The Constitution**

The judicial power shall extend to all cases . . . of admiralty and maritime jurisdiction. . . .

## STATUTES INVOLVED

**28 U.S.C. §1333. ADMIRALTY, MARITIME and prize cases**

The district court shall have original jurisdiction, exclusive of the courts of the States, of:

(1) Any civil case of admiralty or Maritime jurisdiction, saving to suitors in all cases other remedies to which they are otherwise entitled.

(2) Any prize brought into the United States and all proceedings for the condemnation of property taken as prize.

**46 U.S.C. §181 *et seq.* LIMITATION OF LIABILITY**

See Pet. App. 42a.

## STATEMENT OF THE CASE

Everett Sisson was the owner of a 56′ yacht known as the M/V ULTORIAN which was docked at Washington Park Marina in Michigan City, Indiana. The marina was located on Lake Michigan, a navigable waterway. On September 24, 1985, an unfriendly fire erupted on board the yacht, in the area of the washer/dryer unit, destroying the vessel and causing damage to the marina and several neighboring vessels. There has been no judicial determination as to the cause of the fire. There are three possibilities. One, the fire was caused by a defective washer/dryer unit on board the yacht, the negligent installation of the unit and/or the defective construction and installation of the ventilation system. Two, the Sissons had performed routine vessel maintenance and washed oily rags in the washer/dryer unit, and there may have been spontaneous combustion of the rags. Third, the fire may have resulted from some malfunction of the vessel's electrical system.

As a result of the fire, the Respondents (Claimants below) Burton B. Ruby, Fireman's Fund Insurance Company as subrogee of Burton B. Ruby, the Port Authority of Michigan City and other vessel owners asserted claims against Everett Sisson for amounts in excess of $275,000 for the damage to various vessels and the dock. The value of the M/V ULTORIAN before she was totally destroyed was approximately $600,000. Everett Sisson filed a Petition for Exoneration from or Limitation of Liability in the U.S. District Court for the Northern District of Illinois Eastern Division pursuant to 46 U.S.C. §183 *et seq.*



The District Court dismissed the limitation proceeding for lack of subject matter jurisdiction. The dismissal was affirmed on appeal by the United States Court of Appeals for the Seventh Circuit.

## SUMMARY OF ARGUMENT

Everett Sisson believes that the lower courts erred in dismissing his Petition for Exoneration from or Limitation of Liability for lack of subject matter jurisdiction. The occurrence, a fire on a vessel docked on a navigable waterway, is clearly within the admiralty and maritime jurisdiction of the federal courts. Both the situs and nexus requirements of this Court's decisions in *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249 (1972) and *Foremost Insurance Co. v. Richardson*, 457 U.S. 668 (1982) are satisfied by the facts of this case.

The situs of the occurrence was a marina located on Lake Michigan, a navigable waterway.

The nexus test is satisfied because the M/V ULTORIAN was a vessel engaged in the activities of docking, mooring and navigation, which are traditional maritime activities, and because fire is a well known peril of the sea. This Court is urged to adopt the definition of a "vessel" as any craft or artificial contrivance used or capable of being used as a means of transportation on water. This definition, along with the requirement that the vessel be on a navigable waterway, should establish admiralty jurisdiction.

Petitioner believes that the lower courts interpreted this Court's earlier decisions too restrictively by finding that "traditional maritime activity" refers to only navigation. Traditional maritime activity should include more than just navigation. The Seventh Circuit also placed too much emphasis on commercial activity as the underpinning of the nexus test.

Finally, the Limitation of Liability Act should be available to pleasure craft as it applies to "all vessels." The Act also affords a statutory basis for jurisdiction separate and apart from the general maritime jurisdiction of the federal court. This Court's decision in *Richardson v. Harmon*, 222 U.S. 96 (1911) should be seen as supporting this interpretation of §189. There is no reason to reconsider *Richardson v. Harmon*, as the case properly interpreted an amendment to the Limitation of Liability Act, and has nothing to do with the Admiralty Extension Act.

## ARGUMENT

### I.

### THERE IS SUBJECT MATTER JURISDICTION IN THIS CASE PURSUANT TO THE GENERAL GRANT OF ADMIRALTY AND MARITIME JURISDICTION IN ARTICLE III SECTION 2 OF THE CONSTITUTION AND 28 U.S.C. §1333.

#### A. Traditional Maritime Activities Are Not Limited To Situations Involving Commercial Activity And Navigation Through The Water.

The Seventh Circuit's decision involved the interpretation of the decision of this Court in *Foremost Insurance Co. v. Richardson*, 457 U.S. 668 (1982). In its interpretation of the *Foremost* case, the Seventh Circuit developed its own test to determine when the district courts had admiralty jurisdiction in tort cases. The court determined that admiralty jurisdiction would be available in "cases directly involving commercial maritime activity, or to cases involving exclusively non-commercial activities in which the wrong (1) has a potentially 'disruptive impact' on maritime commerce and (2) involves the 'traditional maritime activity' of navigation." Pet. App. 8a. Because this case involved a non-commercial activity, the court determined that the two step analysis for non-commercial activities was necessary to determine jurisdiction.



The Seventh Circuit admittedly applied a narrow reading of the phrase "traditional maritime activity" which was the guidepost established by the *Foremost* Court. It limited such activity to cases involving navigation. Pet. App. 9a. The court justified this narrow reading by certain language found in the *Foremost* decision. The Seventh Circuit reasoned that because this Court emphasized that the "navigation" or "operation of a vessel" were "traditional maritime activities", wrongs arising out of those activities were required for a finding of jurisdiction. This reading limited traditional maritime activities to situations involving navigation through the water, and excluded any other activity which should be considered traditional maritime activity.

Alternatively, the court noted that even if "traditional maritime activity" was not confined to cases involving navigation, the court determined that the sort of fire on board the Sisson yacht should not be considered a "traditional concern" of maritime law. No court has ever tried to distinguish the type of fire as a test for jurisdiction.

The Petitioner believes that the test developed by the Seventh Circuit was excessively restrictive and does not

reflect the intent of the *Foremost* case in deciding jurisdiction on the basis of the presence of traditional maritime activities. The two pronged "test" does not represent a fair reading of *Foremost* for three reasons.[1]

First, the test developed by the court places an inordinate amount of emphasis on maritime commerce as a limiting factor to jurisdiction, but, the court never defined what it meant by "maritime commerce." The Seventh Circuit had previously used commercial activity as the determining factor for maritime jurisdiction issues before the decision in *Foremost*. *Chapman v. United States*, 575 F.2d 147, 1978 A.M.C. 2202 (7th Cir. 1978). This emphasis on maritime commerce was specifically repudiated by this Court in *Foremost* and cannot be the primary basis for any test to determine maritime jurisdiction. The court's decision, in effect, will move the law of admiralty jurisdiction backwards to the pre-*Executive Jet/Foremost* era.

Second, it is clear that the negligent navigation of a pleasure craft on navigable waterways is only one of many actions which have a significant connection with a traditional maritime activity; but it is not the sole, exclusive

[1] Even the concurring opinion recognized that the narrow reading of *Foremost* would place "inappropriate restrictions on admiralty jurisdiction in other instances". As noted by the opinion:

> "However, I do not read the Supreme Court's opinion as necessarily precluding jurisdiction based on other hazards traditionally associated with maritime activities, including fire, when that hazard threatens maritime commerce.
>
> Hopefully, before long, the Supreme Court will revisit this quagmire and resolve the current ambiguity generated by the courts of appeals in the wake of *Foremost*."

There was the recognition that other hazards are associated with maritime activities and these included fire. Still, the concurring opinion focused on "maritime commerce" as the primary basis for admiralty jurisdiction.



wrong. The test is whether the wrong has a significant connection with traditional maritime activity and not whether the wrong only involves the negligent navigation of a vessel.

Third, even if admiralty jurisdiction is limited to cases involving navigation, there is no legal or logical basis upon which to restrictively define "navigation" to the type involved in the *Foremost* case.

As for what constitutes "traditional maritime activity", navigation cannot be the only qualifying activity as such a reading would eliminate a whole range of other activities commonly associated with vessels such as fueling, repairs, maintenance, cargo operations, etc. Sailors paint, clean, wash, cook, work, rest and sleep on their vessels.

The "maritime commerce" element to the court's analysis is most peculiar for two reasons. First, the court, while it seemingly looked to determine what, if any, disruptive impact on maritime commerce had occurred, failed to define what it meant by maritime commerce. Second, if maritime commerce meant to refer to the commercial, profit-making enterprises associated with maritime law, is not the operation of a marina a commercial activity? Vessels pay dockage, buy fuel and provisions, obtain insurance, pay salaries, repair boats and pay taxes. These goods and services move, as do the boats themselves, in interstate commerce. Here, the claimants' dock and boat were damaged. The dock was located along a commercial channel. Did not the fire have a potential impact upon maritime commerce? The court seems to have overlooked all of these aspects.

THE ULTORIAN was tied up at a dock on a navigable waterway, Lake Michigan, at the time of the fire. The mooring or docking of a vessel is a traditional maritime

activity. Docks serve the various needs of vessels and have done so for centuries. During the course of a sailing season, vessels, such as the ULTORIAN, are customarily moored or docked at marina facilities when they are not actually in use. Typically, a contract between the vessel owner and the marina owner governs the docking or mooring, and these contracts are subject to admiralty jurisdiction. *American Eastern Development Corp. v. Everglades Marina, Inc.*, 608 F.2d 123, 1980 A.M.C. 2011, 2012 (5th Cir. 1979); *English Whipple Sail Yard Ltd. v. The Yawl Ardent*, 459 F. Supp. 866, 1980 A.M.C. 1104 (W.D. Pa. 1978). Also, as vessels are not always moving, from time to time they need to be moored or docked for repair, rest, convenience, replenishment, maintenance, weather and landing of goods and people. All of these functions are part of the marine activities of a vessel. This does not mean that they have been withdrawn from maritime navigation or activity. They are simply in a floating position from which they can be quickly started and taken out to sea. Mooring and docking as traditional maritime activities are clearly evident in the multitude of admiralty cases which involve such activities. Some recent examples of these are found in *Weyerhaeuser Company v. ATROPAS Island*, 777 F.2d 1344 (9th Cir. 1985); (vessel liable for damages to dock when it dragged anchor and hit dock); *Hardesty v. Larchmont Yacht*, 1983 A.M.C. 1059 (S.D.N.Y. 1982) (damages to yacht which broke free from a mooring).

However, even if the Seventh Circuit was correct in interpreting this Court's decision in *Foremost*, it failed to define what is meant by "navigation". Ironically, relying on "navigation" as the defining element also creates definitional problems, as the panel recognized. Pet. App. 13a n.7. This restricted view will not limit jurisdictional issues,



but will only cause future confusion and destroy the uniform application of maritime law.

However, even if navigation is the only traditional maritime activity which could trigger the maritime jurisdiction of this Court, the ULTORIAN was in navigation at the time of the fire. To find otherwise would be a restricted and unwarranted interpretation of the meaning of "navigation" as demonstrated by the Fifth Circuit Court of Appeals in *American Eastern*, supra.

*American Eastern* involved two pleasure craft which had been damaged in a fire at a marina. The boats were fully operational and were lifted in and out of the water on a weekly basis by a forklift. The court noted that the purpose of the storage was to obviate storage in salt water with the attendant cost of maintenance (including keeping the boats barnacle free).

With regard to the issue of whether a claim against the marina could be plead in admiralty, the Fifth Circuit stated as follows:

> The boats were not withdrawn from navigation. This case is more analogous to those involving docking or wharfage to those where boats are stored for the winter or laid up for long periods. In recent years, many pleasure boaters who frequently take their boats in and out of the water, as appellees here did, have come to regard dry storage at waterside marinas, from which the boats may be readily taken in and out, as an alternative to tying their boats up at docks or moorings. The boat is readily accessible to the water and can be quickly and easily launched or brought ashore to the storage shed but it is not exposed to deteriorating effects of water or weather. Moreover, in determining whether a vessel has been withdrawn from navigation, one must look at its pattern of use. Pleasure boats are often tied up a higher

> proportion of the time than commercial vessels which typically may spend little time in port. Here, the boats in question were used no less than necessary or appropriate for pleasure craft, and the dry storage, incident to regular use, was a substitute for wet mooring or docking. Admiralty jurisdiction has, in the past, changed as "new conditions give new rise to new conceptions and maritime concerns." (Citations omitted.)

608 F.2d at 124-25.[2]

The Fifth Circuit, therefore, concluded that the fact that the boats were taken in and out of the water almost on a weekly basis did not mean that they were withdrawn from navigation and thus, the claims fell within the admiralty jurisdiction of the Court. *Id.* at 125.[3] The term "navigation" is not restricted solely to a vessel moving in the water. It is the whole panoply of functions a vessel performs in the water.

Clearly the facts in this case are even stronger than in *American Eastern*, because the ULTORIAN was not beached or lifted in and out of the water on a regular basis but was moored in a navigable waterway at a dock in a marina. It was not withdrawn from navigation and was thus involved in a traditional maritime activity at the

[2] Both the District Court and the Court of Appeals distinguished *American Eastern* by reading it as a contract case. However, it is cited for the proposition that navigation is not limited to movement in the water but may also include the period of docking or mooring.

[3] Ironically, the *Foremost* case also originated in the Fifth Circuit and this Court affirmed the decision of the Court of Appeals regarding the correct interpretation of the standard needed to support admiralty jurisdiction.



time of the fire. The fire also caused damage to the marina's dock and other vessels in the water all of which were engaged in a traditional maritime activity.

Finally, if navigation is the only activity to support a finding of jurisdiction, the fire here obviously disrupted the movement (navigation) of boats within the navigable waters of the marina. It also was a potentially disruptive event to the nearby commercial channel, and the Coast Guard's nearby rescue station.

The Seventh Circuit's opinion also ignores the universal recognition of fire as a classic marine peril. Indeed, according to the Fifth Circuit, in a case involving a fire aboard a docked freighter,

> A non-friendly fire [as opposed to a galley stove fire] aboard ship so long as it remains unextinguished is a classic case of marine peril. With flammable materials almost everywhere, passages and spaces where natural convection readily permits a small smoldering to break out in a blazing fury, the history of the sea attests to fire as a cause of some of the most catastrophic of marine disasters. See, the *Morro Castle and Texas City Disasters.*

*Legnos v. M/V Olga Jacob*, 498 F.2d 666, 670 (5th Cir. 1974) (citing *United States v. Abbott*, 89 F.2d 166 (2d Cir. 1937)); *Hyman v. Pottberg's Ex'rs.*, 101 F.2d 262 (2d Cir. 1939); *Petition of Agwi Navigation and New York & Cuba Mail S.S.*, 1939 A.M.C. 895 (S.D.N.Y. 1939); *New York & Cuba Mail S.S. Co. v. Continental Insurance Co.*, 32 F.Supp. 251 (S.D.N.Y. 1940) (fire abroad passenger vessel cause death of over one hundred persons); *In re Texas City Disaster Litigation*, 197 F.2d 771 (5th Cir., 1952), *aff'd sub nom., Dalehite v. United States*, 346 U.S. 15, 73 S.Ct. 956, 97 L.Ed. 1427 (1953) (approximately 560 persons killed and much of Texas City destroyed by fires

and explosions originating from cargoes of fertilizer on two vessels in Texas City Harbor); *Republic of France v. United States*, 290 F.2d 395 (5th Cir. 1961). In this case, there can be no doubt that the destruction of almost one million dollars of property and the potential threat to lives was the result of an unfriendly fire, a recognized marine peril.

There can be little doubt that fire on a vessel is regarded as one of the three greatest dangers at sea. See, *Southport Fisheries, Inc. v. Saskatchewan Government Ins. Office*, 161 F.Supp. 81, 83-4 (D.C.N.C. 1958).[4] Regulations promulgated by the United States Coast Guard promote and enforce fire safety on vessels. (See 46 C.F.R. §§ 72.03, 72.05, 72.15, 72.20 and § 76, generally.) Also, the Safety of Life At Sea Convention ("SOLAS") 32 U.S.T. 47 has promulgated fire safety regulations utilized in evidence in federal maritime tort cases. *Meyers v. The M/V Eugenio C.*, 876 F.2d 38, 39 (5th Cir. 1989). The Secretary of Transportation is also authorized to prescribe regulations for firefighting equipment on board recreational vessels. 46 U.S.C. § 4302.

**B. The Grant of Admiralty and Maritime Jurisdiction to Federal Courts Should Be Broadly Construed.**

Since the early days of this nation, the grant of admiralty and maritime jurisdiction to this Court in the Constitution has been broadly construed by the courts.

The first exposition of admiralty tort jurisdiction was expressed by Justice Story while he was Circuit Justice

[4] The court described fire as a risk which was more likely to result in a loss to those engaged in maritime activity. The other two risks are foundering and piracy.



for the District of Massachusetts. *DeLovio v. Boit*, 7 *Fed. Cas.* 418 (C.C.D. Mass. 1815). In *DeLovio* Judge Story stated that jurisdiction over torts depended ". . . upon locality, *i.e.*, whether done upon the high sea, or in ports within the ebb and flow of the tide, or not." Judge Story also noted that the grant of the Constitution was broader than just "admiralty" under English law:

> The clause however of the Constitution not only confers admiralty jurisdiction, but the word "maritime" is super added, seemingly ex industria, to remove every latent doubt. "Cases of maritime jurisdiction" must include all maritime contracts, torts and injuries, which are in the understanding of the common law, as well as of the admiralty, "causae civiles et maritime." In this view there is a peculiar propriety in the incorporation of the term "maritime" into the Constitution. The disputes and discussions, respecting what the admiralty jurisdiction was, could not but be well known to the framers of that instrument. [Citation omitted]. One party sought to limit it by locality, another by the subject matter. It was wise, therefore, to dissipate all question by giving cognizance of all "cases of maritime jurisdiction," or, what is precisely equivalent, of all maritime cases. . . . [T]he language of the Constitution will therefore warrant the most liberal interpretation. . . .
>
> At all events, there is no solid reason for construing the terms of the Constitution in a narrow and limited sense, or for ingrafting upon them the restrictions of English statutes, or decisions that common law founded on those statutes, . . . . The advantages resulting to the commerce and navigation of the United States, from a uniformity of rules and decisions in all maritime questions, authorize us to believe the national policy, as well as juridical logic, require the clause of the Constitution to be so construed, as to embrace all maritime contracts, torts and injuries, or, in other words, to embrace all those causes, which

originally and inherently belonged to the admiralty, before any statutable restriction.

*Id.* at 442-43.

There has been no development since Justice Story wrote those words which would suggest that the jurisdiction of this Court should now be restricted. Indeed, this Court's decision in *Foremost* appears to be a direct repudiation of a restrictive interpretation of the admiralty and maritime jurisdiction. The Seventh Circuit's decision, however, would restrict this grant of jurisdiction contrary to its historical development, which also has contributed to the development of a uniform body of law.

A rule which would distinguish between fires according to whether the vessel is docked or physically "in navigation" when the fire arises, or between whether the source of ignition is maritime or non-maritime, would destroy the uniformity which is the object of the admiralty jurisdiction and ignores the marine perils shared by pleasure and commercial vessels.

For instance, if a passenger carrying excursion vessel located at the same marina caught fire and caused the same damage would there be maritime jurisdiction simply because the vessel was arguably a commercial vessel even if there was no impact on navigation? If the answer is yes, what is the difference in the substantive impact between such a fire and the fire on board the ULTORIAN? If the fire on the passenger carrying vessel began in the dryer on board, would this be sufficient for jurisdiction simply because the dryer was on board a commercial vessel? If there is truly a basis for making these distinctions solely on the basis of the function of the vessel (pleasure or commercial) then no activity or fire involving a pleasure craft can ever trigger admiralty jurisdiction.



There are other conceivably conflicting results created by the Seventh Circuit's approach. If Everett Sisson had hired an employee to man the M/V ULTORIAN and that employee was injured as a result of the fire, he would be entitled to make a claim for injuries in admiralty as a Jones Act seaman. 46 U.S.C. §688; *Barrett v. Chevron, U.S.A., Inc.*, 781 F.2d 1067 (5th Cir. 1986); *Offshore Oil Co. v. Robinson*, 266 F.2d 769 (5th Cir. 1959); *Gorgas v. Williams*, 1976 A.M.C. 2387, 2396 (D.N.J.); *Petition of Read*, 224 F.Supp. 241, 244-46 (S.D. Fla. 1963). Mr. Sisson would also owe a continuing, absolute and nondelegable duty to his crew member to provide a seaworthy vessel. *Petition of Read*, supra at 248-49, 251. The injured crew member would also be entitled to maintenance and cure. *Calmar S.S. Corp. v. Taylor*, 303 U.S. 525, 530, 58 S.Ct. 651, 654 (1938). Yet, presumably, Mr. Sisson would not be in a position to limit his liability because the vessel was not in commerce nor in navigation.

Everett Sisson would find himself in the same position if a social guest were on board at the time of the fire and the guest injured as a result of the fire. This Court has held that the owner of a pleasure craft owes a duty to use due care toward non crew members lawfully on board the vessel and that such a claim would fall under the general maritime law based in negligence. *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 630-31, 79 S. Ct. 406, 409-10 (1959). In *Kermarec*, the plaintiff was injured while he was visiting a member of the ship's crew as a result of a fall down a stairway. The plaintiff's action was brought alleging unseaworthiness and negligence. This Court refused to draw the common law distinction between licensee and invitee and simply held that "the owner of a ship in navigable waters owes to all who are on board for purposes not inimicable to his

legitimate interest the duty of exercising reasonable care under the circumstances of each case." *Id* at 632. Those principles have been applied to pleasure craft cases by both federal and state courts. *Gele v. Chevron Oil Co.*, 574 F.2d 243, 248 (5th Cir. 1978); *Gibboney v. Wright*, 517 F.2d 1054, 1059 (5th Cir. 1975); *Urian v. Milstead*, 473 F.2d 948, 949-50 (8th Cir. 1973); *Branch v. Schumann*, 445 F.2d 175, 179 (5th Cir. 1971); *Armour v. Gradler*, 448 F. Supp. 741, 744, 747-48 (W.D. Pa. 1978); *Roper v. Stafford*, 444 A.2d 289 (Del. Super. 1982) (holding that federal maritime law, including the Federal Boat Safety Act of 1971, governed an action against a motor boat operator); *Zukowsky v. Brown*, 79 Wash. 2d 586, 488 P.2d 269 (1971) (applying the principles of *Kermarec*); *Cashell v. Hart*, 143 So.2d 559 (Fla. Dist. App. 1962) (applying the principles of *Kermarec*).

What if Mr. Sisson had a passenger for hire on board to be carried across the Lake to Milwaukee the next morning? What if a guest paid for fuel? Does the result change under Sisson? Should it? What about pleasure craft the size of Mr. Trump's yacht or Mr. Forbes' yacht?

Based upon this Court's decision in *Kermarec*, Everett Sisson would face liability for the injuries sustained by his social guests in accordance with the rules governing negligence in general maritime law and, yet, would not be able to limit his liability because the fire, the condition which gave rise to it and the activity at the time would be outside the scope of maritime jurisdiction based on the Seventh Circuit's opinion. He could also face penalties under the Federal Boat Safety Act of 1971, 46 U.S.C §2301 if it is later determined that the fire onboard the M/V ULTORIAN was caused by the negligent manner in which Mr. Sisson was operating the ULTORIAN. He would then face penalties under federal law with no right to limitation.



The uniformity objective of admiralty jurisdiction is an important concept and has its roots in Article III, Section 2 of the Constitution in which the federal judiciary was given admiralty and maritime jurisdiction. This has been interpreted by this Court to encompass three different grants of power:

> (1) It empowered Congress to confer admiralty and maritime jurisdiction on the "Tribunals inferior to the Supreme Court" which were authorized by Art. I, §8, cl.9. (2) It empowered the federal courts in their exercise of the admiralty and maritime jurisdiction which had been conferred on them, to draw on the substantive law "inherent in the admiralty and maritime jurisdiction," [citation omitted], and to continue the development of this law within Constitutional limits. (3) It empowered Congress to revise and supplement the maritime law within the Constitution.

*Romero v. International Terminal Operating Co.*, 358 U.S. 354, 360-61, *reh. den.*, 359 U.S. 962 (1959).

It is important to maintain the uniformity of admiralty law in order to conform to the Constitutional protection afforded it. The only way this uniformity can be maintained is through the federal judiciary which has historically interpreted and applied federal maritime law and sought to preserve the uniformity. The Seventh Circuit's decision threatens that uniformity by removing from federal jurisdiction, a whole class of cases based on an unjustifiably narrow reading of this Court's opinions.

### C. The Seventh Circuit's Decision Is In Conflict With Other Circuits.

The test developed by the Seventh Circuit is also in sharp contrast with the law in other circuits which generally follow the 5th Circuit test. *Kelly v. Smith*, 485 F.2d 520 (5th Cir. 1973), *cert. denied*, 416 U.S. 969 (1974); *Drake*

*v. Raymark Industry*, 772 F.2d 1007, 1986 A.M.C. 1965 (1st Cir. 1985), *cert. denied*, 106 S.Ct. 1974 (1986); *Oman v. Johns-Manville Corp.*, 764 F.2d 224, 1985 A.M.C. 2317 (4th Cir.) *en banc, cert. denied*, 474 U.S. 970 (1985); *Harville v. Johns-Manville Products Corp.*, 731 F.2d 775, 1986 A.M.C. 731 (11th Cir. 1984); *Edynak v. Atlantic Shipping, Inc.*, 562 F.2d 215, 1977 A.M.C. 2477 (3d Cir. 1977); *T.J. Falgout Boats, Inc. v. U.S.*, 508 F.2d 855 (9th Cir. 1974); *St. Hilaire Moye v. Henderson*, 496 F.2d 973 (8th Cir. 1974), *cert. denied*, 419 U.S. 884 (1974).

The Fifth Circuit Court of Appeals noted the factors which are used to determine whether an alleged wrong bears a sufficient nexus to a traditional maritime activity. Those factors are: (1) the functions and roles of the parties; (2) the types of vehicles and instrumentalities involved; (3) the causation and type of injury; and, (4) the traditional concepts of the role of admiralty law. *Kelly*, 485 F.2d at 525. This test was developed before this Court's decisions in *Executive Jet* and *Foremost*, but most circuits have looked to the test to make the nexus determination.

Recently, the Fifth Circuit added additional criteria to consider in making such a decision which it gleaned from this Court's decisions. *Molett v. Penrod Drilling Co.*, 826 F.2d 1419 (5th Cir. 1987). There it looked to: (1) the impact of the event in maritime shipping and commerce; (2) the desirability of a uniform national rule; and, (3) the need for admiralty expertise in the trial and decision.

Petitioner recognizes that there are problems with the *Kelly* test factors which do not render an easy solution in all cases. Yet, all other tests clearly show that flexibility is called for beyond that mandated by the Seventh Circuit's almost exclusive reliance on the element of commerce.



As an example of the flexibility, the test of *Kelly/Molett* would confer admiralty jurisdiction here. The Petitioner was a boat owner and the Claimant-Respondents were boat owners at a marina. The vehicles involved were vessels and a vessel dock. The type of injury was the destruction of vessels at a dock. Docking and mooring are traditional maritime activities. The fire and sinking had a potential impact on navigation in the harbor and channel. National rules already apply to the M/V ULTORIAN, and admiralty expertise will be needed to apply the rules to this case.

Applying the two-part test of *Smith v. Knowles*, 642 F. Supp. 1137 (D.Md. 1986), would also result in jurisdiction. Then you would have the traditional activities of mooring and docking as well as the installation of the washer/dryer unit in a vessel. A vessel is distinctly maritime in nature. The second part of the test is also satisfied here, because the fire spread to other vessels at other docks causing damage that could clearly have hindered the navigation of any other vessels within the harbor. The fire could have spread throughout the marina, into a nearby channel and to the Coast Guard rescue station which would then have hindered navigation of other vessels.

Also, the instrumentalities, the claimants and the peril involved in the instant case all satisfy the requisites set by this Court. The seaworthiness of the M/V ULTORIAN may also be questioned and that must be tested by uniform federal standards. Limitation is a concept peculiar to admiralty law. *Executive Jet* 409 U.S. at 270.

Most recently, the Court of Appeals for the Sixth Circuit, in deciding that the Limitation of Liability Act applied to pleasure craft noted the concurrence by Judge Ripple where he even criticized the Seventh Circuit's "in-

defensibly narrow reading of *Foremost Insurance.*" *In re Young*, 872 F.2d 176, 178 (6th Cir. 1989) (Personal injuries resulting from explosion on board a pleasure craft while operated on Lake Erie.).

While the test formulated by the Fifth Circuit is more satisfying it still has two inherent defects. First, commerce is an element which is still considered. Second, it fails to focus on the obvious. A vessel can only engage in the activities for which it is designed, all of which are maritime in nature. Vessels are not built to house or transport people on land. They are built to transport people and cargo on the water for a multitude of purposes, both for hire and pleasure. A craft attains the status of a vessel when it has been completed, launched, fitted out and is ready to function. See *Thames Towboat Co. v. The Schooner "Francis McDonald"*, 254 U.S. 242, 41 S.Ct. 65 (1920). In performing that essential function, vessels navigate through the water, moor and dock, are repaired and maintained, carry machinery and appliances, employ crewmen and take out insurance. Once an instrumentality has been defined as a vessel, it can only be considered engaged in maritime activity. Otherwise, it would not be a vessel at all. Once permanently removed from navigation, it loses its status. *Evansville & Bowling Green Packet Co. v. Chero Cola Bottling Co.*, 271 U.S. 19, 46 S.Ct. 379 (1926).

Petitioner takes the position that the decision in *Foremost* precludes any test which restricts admiralty jurisdiction to the commercial activity or navigation through the water. The determination of admiralty jurisdiction must be expansive and not restrictive as to do otherwise would destroy traditional notions of admiralty jurisdiction and uniformity on the nation's waterways.



**D. Test For Admiralty Jurisdiction.**

It is suggested that a test that would cover both the interest in *DeLovio v. Boit*, for an expansive application of the constitutional grant of admiralty and maritime jurisdiction and the nexus requirement of *Executive Jet* would be in the best interests of admiralty and maritime law as it would provide the required uniformity and predictability. Both interests could be satisfied if the tort occurred during an activity on a navigable waterway and involved "every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water." 1 U.S.C. § 3.

If the tort occurred on navigable water and involved a vessel, there would be maritime jurisdiction. All other torts, unless otherwise statutorily included, would be excluded from maritime jurisdiction.

If the "watercraft" or "contrivance" were used or capable of being used as a means of transportation on water, the nexus test would be satisfied. First, by definition, only those torts involving vessels would be included in jurisdiction. Second, the definition of "vessel" is broad enough to include all manner of craft such as barges, tugs, freighters, rowboats, ferry boats, excursion boats, fishing boats and certainly the *M/V Ultorian*. Third, the definition limits jurisdiction to craft which are used or capable of being used in a traditional maritime activity, i.e. transportation on the water. This would include the transportation of property and people (recreational or commerce). Fourth, this formulation would eliminate craft which have never been in navigation or which have been permanently withdrawn from navigation. Fifth, application of the nexus test would be greatly simplified as the focus would be on the vessel or contrivance involved. The

courts would no longer have to split hairs over what is or is not traditional maritime activity or whether the activity had a potential impact on commerce. Sixth, this formulation is flexible enough to expand as maritime technology changes and evolves. Seventh, it would lead to uniformity in law applicable to vessel casualties on navigable waters. It would be consistent with all federal laws which define and regulate vessels, and this Court's previous rulings, bringing all vessels traveling on navigable waterways into the universe of the admiralty. Finally, proper state interests would still be protected as the definition would include the situs requirement.

It is suggested that this objective test would produce more uniformity on navigable waterways than the multipart subjective test that would only create more confusion.

## II.

## THE LIMITATION OF LIABILITY ACT 46 U.S.C §181 *ET SEQ.* PROVIDES A SOURCE OF ADMIRALTY JURISDICTION SEPARATE AND APART FROM JURISDICTION UNDER 28 U.S.C. §1333.

### A. The Limitation Act Applies To All Vessels.

#### 1. The Legislative History Supports The Proposition That Congress Intended The Limitation Act To Cover Pleasure Craft.

The section of the Limitation Act which is directly at issue here is 46 U.S.C. §183(a) which reads as follows:

> Liability of the owner of *any vessel*, whether American or foreign, for any embezzlement, loss, or destruction by any person or any property, goods or merchandise shipped or put on board of such vessel or for any loss, damage or injury by collision or for any fact, matter, or thing, loss, damage or forfeiture,



> done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not, except in the cases provided for in subsection (b) of this section, exceed the amount or value of the interest of such owner in such vessel, and her freight then pending. (Emphasis added.)

The history of the Limitation Act and specifically §183 clearly demonstrates that Congress intended for pleasure craft to be included in the generic category of "vessel".

The original Limitation Act was enacted in 1851 and its stated purpose was, as one commentator has noted, "to place the American merchant marine and shipbuilding industry on equal footing with those of the old maritime nations of Europe". *Herman*, "Limitation of Liability for Pleasure Craft" Journal of Maritime Law and Commerce, Volume 14, Number 3, July, 1983 at 419. Today, many pleasure craft are built overseas in direct competition with domestic builders. Subsequent to the enactment of the statute, there was much debate as to whether pleasure craft were intended to be included. This issue was seemingly put to rest by the decision in *The Mamie*, 5 F. 813 (D.C. Mich. 1881), *aff'd.*, 8 F. 367 (C.C.E.D. Mich. 1881) where a federal district court held that the Limitation Act was restricted to vessels of a commercial nature.[5]

Following the decision in *The Mamie*, Congress amended the Limitation Act to extend its application to "*all seagoing vessels*, and also to *all vessels* used on lakes or rivers or in inland navigation, including canal boats, barges and lighters." Active June 19, 1886, Chapter 421 §4, 24

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[5] A good, concise history of the Limitation Act may be found in *In re Porter*, 272 F.Supp. 282, 283-284 (S.D. Tex. 1967). See also Bartlett, *When is a Boat Not a Vessel? Recreational Boats Navigate Through the Jurisdiction and Limitation Quagmire*, 1989, ABA Tort and Insurance Practice Section Tips on the Law of Small Boating.

Stat. 80 as amended 46 U.S.C. §188 (1970). Congress subsequently amended the Limitation Act in 1935, 1936 and 1984. The 1936 amendment to the Act covered §183(b)-(e) and the term "seagoing vessels" was defined to exclude "pleasure yachts", but only for the purposes of §183(b)-(e) which have to do with the per ton dollar limitation for bodily injury. The term "vessel" in §183(a) was not restricted.[6] The 1984 Amendment to §183(b) did not restrict the definition of the term "vessel" in any way. As amended October 19, 1984 Pub.L. 98-498 Title II, §213(a), 98 Stat. 2306. Most courts have recognized that by excluding "pleasure yachts" from the $60 per ton requirement, Congress showed its intent in having such vessels included in the remaining provisions of the Act. *In re Complaint of Brown*, 536 F.Supp. 750, 751 (N.D. Ohio 1982); *Petition of Klarman*, 295 F.Supp. 1021, 1022, (D. Conn. 1968); *In re Porter*, supra at 284 (S.D. Tex. 1967).

Some courts have determined that Congress did not intend to signal that a pleasure craft was a vessel for the purpose of §183(a) when it amended the Act in 1936. *In re Lowing*, 635 F.Supp. 520, 524 (W.D. Mich. 1986). However, this is an incorrect conclusion and contrary to the rules governing how courts may interpret legislative intent because it ignores the Act as a whole which clearly makes yachts "vessels" for purposes of §183.

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[6] 46 U.S.C. §183(f) provides:

> As used in subsections (b), (c), (d), and (e) of this section and in §183(b) of this title, the term "seagoing vessel" shall not include pleasure yachts, tugs, towboats, towing vessels, tank vessels, fishing vessels or their tenders, self-propelled lighters, nondescript self-propelled vessels, canal boats, scows, car floats, barges, lighters, or nondescript non-self propelled vessels, even though the same may be seagoing vessels within the meaning of such term as used in §188 of this title.



Finally, §188 of the Act (entitled "Limitation of Liability of Owners Applied to All Vessels") unequivocally states that §183 "shall apply to all seagoing vessels, and also to all vessels." This draws the same distinction between "seagoing vessels" and "vessels" as is found in §183(a) and §§183(b)-(e). As one court insightfully noted,

> Since, if a pleasure yacht were not a vessel, and hence excluded from the operations of §183(a), it would be unnecessary to exclude it from §183(b)-(e), it is obvious that a pleasure yacht is a vessel for the purposes of §183(a). *Complaint of Brown*, supra at 751.[7]

The plain statutory language in the Limitation Act should be followed. *United States v. Monsanto*, 109 S.Ct. 2657, 2662-63 (1989); *Immigration & Naturalization Service v. Cardoza-Fonsera*, 480 U.S. 421 (1987). "All vessels" means all vessels.

**2. The Majority of Courts Have Applied The Limitation Act To Pleasure Craft.**

Not only has Congress manifested its intention to cover pleasure craft within the Limitation Act, but the vast majority of courts have also found that the Limitation Act covers pleasure craft.

The decision by Congress to amend the Limitation Act in 1886 in the wake of the restrictive interpretation found in *The Mamie* was not lost on the federal district court in *The Alola*, 228 F. 1006 (D.C. Va. 1915). There a petition for limitation filed by the owner of a forty-five foot

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[7] Gilmore & Black, in their noted treatise also conclude that vessels excluded from §183(b) are entitled to the protection of the other provisions of the Limitation Act. Gilmore & Black, *The Law of Admiralty*, 2d Ed. p. 836.

gasoline motor boat was granted by the court. This was followed by *In Re Foss (THE LUVINA)*, 1927 A.M.C. 327 (S.D.N.Y. 1927) in which the district court determined that Congress had demonstrated its intent of extending limitation of liability to noncommercial vessels engaged in pleasure pursuit and affirmed the right of an owner of a pleasure craft to take advantage of the Limitation Act. The Second Circuit in *The Oneida*, 282 F.288 (2d Cir. 1922), and recently in *In the Matter of Michael Guglielmo*, 1990 U.S. App. LEXIS 2881 (2d Cir. 1990); the Fourth Circuit in *Richards v. Blake Builders Supply*, 528 F.2d 745 (4th Cir. 1975); the Fifth Circuit in *Warnken v. Moody*, 22 F.2d 960 (5th Cir. 1927) and *Gibboney v. Wright* 517 F.2d 1054 (5th Cir. 1975); the Sixth Circuit in *Feige v. Hurley*, 89 F.2d 575 (6th Cir. 1937) and *In Re Young*, supra; the Eighth Circuit in *St. Hilaire Moys v. Henderson*, 495 F.2d 978 (8th Cir.), *cert. denied*, 419 U.S. 884, 95 S.Ct. 151 (1974); and, the Ninth Circuit in *Hechinger v. Caskie*, 890 F.2d 202 (9th Cir. 1989) have held that the term "vessel" as used in the Act included pleasure craft. Most recently, the Eleventh Circuit in a well reasoned decision, ruled that a jet ski boat was a vessel and entitled to limitation under the Act. *Keys Jet Ski, Inc. v Kays* 1990 U.S. App. LEXIS 1380 (11th Cir. 1990)

This Court has also had the opportunity to review this issue on at least three occasions. *Coryell v. Phipps*, 317 U.S. 406, 63 S.Ct. 291, 87 L.Ed. 363 (1943); *Just v. Chambers*, 312 U.S. 668, 61 S.Ct. 687, L.Ed. 903 (1941); and *The Linseed King*, 285 U.S. 502, (1932). Each case involved the Limitation Act and in each case there was no discussion or question regarding its application to pleasure craft.

Since the early cases cited above, most other courts have also found that the Limitation Act is applicable to



pleasure craft. *In re Complaint of Brown*, 536 F.Supp. 750 (N.D. Ohio 1982); *Armour v. Gradler*, 448 F.Supp. 741 (W.D. Pa. 1978); *Application of Theisen*, 349 F.Supp. 737 (E.D.N.Y. 1972); *Petition of Klarman*, 295 F.Supp. 1021 (D. Conn. 1968); *In re Porter*, supra at 282 (S.D. Tex. 1967); *Kaiser v. Traveler's Ins. Co.*, 359 F.Supp. 90 (E.D. La. 1973), *aff'd.*, 487 F.2d 1300 (5th Cir. 1979); *Petition of Colonial Trust Co.*, 124 F.Supp. 73 (D. Conn. 1954); *In re Liebler* 19 F.Supp. 829, 832 (W.D.N.Y. 1937).

While some courts have questioned the result, they have chosen to follow the intent of Congress and well established case law. *In re Porter*, supra at 285-86. The Eleventh Circuit in reviewing *In re Young*, supra agreed with the Sixth Circuit when it said: "If, indeed, anything is broken, it's up to Congress to fix it." *In re Young*, supra at 178. Other cases which hold to the contrary are clearly the minority view.

**3. Other Statutes.**

If there is any doubt as to what Congress intended by the term "vessel" in §183(a), one need only look at other statutes dealing with maritime activity in which the term "vessel" is used in order to show that "vessel" includes pleasure craft.

1 U.S.C. § 3 entitled "Rules of Construction" provides as follows:

> *"Vessel" as including all means of water transportation*
>
> The word "vessel" includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water.

It is clear from this section that Congress intended the word "vessel" or the words "all vessels" to be construed

in its broadest sense. *McCarthy v. The Bark Peking*, 716 F.2d 130 (2d Cir. 1983); *Trinidad Corp. v. American S. S. Owners Mutual Protection & Indem. Association*, 229 F.2d 57 (2d Cir. 1956), *cert. denied*, 351 U.S. 966, 76 S.Ct. 1032 (1956). Courts have followed this dictate and found house boats and yachts to be "vessels." *Miami River Boat Yard, Inc. v. 60' Houseboat etc.*, 390 F.2d 596 (5th Cir. 1968); *The Ark*, 17 F.2d 446 (S.D. Fla. 1926); *Hudson Harbor 79th Street Boat Basin, Inc. v. Sea Casa*, 469 F.Supp. 987 (S.D.N.Y. 1979); *Jones v. One Fifty Foot Gulfstar Motor Sailing Yacht, etc.*, 625 F.2d 44 (5th Cir. 1980); *U.S. v. Holmes*, 104 F. 884 (C.C. Ohio 1900); *The International*, 32 C.C.A. 258, 89 F. 484 (C.C.A. Pa. 1898). Even a jet ski which is being used as a means of transportation on water is a "vessel" within this definition. *Key Jet Ski, Inc.*, supra at 1526.

The same definition of vessel was transferred *verbatim* to 46 U.S.C. §2101(45) ("Shipping") which was enacted in 1984.

In 1971, Congress enacted the "Coordinated National Boating Safety Program" codified in 33 U.S.C. §§1451 *et seq.* While that Act has been repealed, the way in which Congress defined certain terms is illustrative. Section 1452(2) defined "vessel" as:

> every description of watercraft, other than a seaplane on the water, used or capable of being used as a means of transportation on the water.

The similarity between this definition and the one found in 1 U.S.C. §3 is striking and is again illustrative of what Congress intends by the term "vessel."

Finally, 33 U.S.C. §2003 (a) entitled "Inland Navigational Rules" administered by the United States Coast Guard defines "vessel" as "every description of water-



craft, including nondisplacement craft and seaplanes, used or capable of being used as a means of transportation on water."

Congress has clearly expressed its intent as to how it defines the word "vessel" in at least three separate statutes enacted over a long period of time. If this history is not persuasive enough, this Court need only rely on the first rule of statutory interpretation which is that words in statutes should be given their ordinary common meaning unless there is persuasive reason to the contrary. *International Admrs., Inc. v. Life Ins. Co. of N.A.*, 753 F.2d 1373 (7th Cir. 1985).

For this ordinary common meaning we can look to Webster's Dictionary which defines "vessel" as

> "A craft for traveling on water; a ship or boat, especially one larger than a rowboat." *Webster's New Universal Unabridged Dictionary*, 2nd Ed.

The Ultorian fits this definition as well as the statutory definitions outlined above.

**4. The Minority View.**

The few courts that have recently held that the Limitation Act does not cover pleasure craft are clearly in a minority. They have ignored the clear meaning of the term "vessel" in §183(a). They have sought to downplay the actions of Congress in its amendatory dealings with the Act. Furthermore, they have chosen to further ignore the definition of "vessel" contained in other statutes dealing with maritime matters. These Courts have ignored the common definition of the word "vessel" even though the first rule of statutory interpretation demands it. In closing their eyes to all of this, they have also failed to construe legislation so that it effectuates legislative in-

tent. *In Re Arnett*, 731 F.2d 358 (6th Cir. 1984); *United States v. Smith*, 209 F.Supp. 907 (E.D. Ill. 1962).

It is clear that these courts which have chosen to ignore Congressional intent and the overwhelming case precedent in favor of applying the Limitation Act to pleasure craft do so because they believe that the policy of allowing pleasure craft owners to limit liability is incorrect. However, it is for Congress to decide this issue. *Keys Jet Ski, Inc.*, supra at 1526.

**5. Uniformity Requires That Pleasure Vessels Be Given The Benefit Of Limitation Of Liability.**

Allowing limitation to a commercial vessel and not to a pleasure craft would be contrary to this Court's decision in *Foremost*, which removed the distinction between pleasure craft and commercial vessels. There is no sound reason for distinguishing between vessels which ply the same navigable waters and operate under the same regime of maritime rules and regulations.

**6. Summary.**

There is overwhelming support for application of the Limitation Act to the instant situation. The plain common meaning of the word "vessel" in §183(a) includes pleasure craft. Congress has amended the Act several times over time and has always made it clear that pleasure craft are covered by §183(a). Congress has also defined "vessel" in other analogous statutes to include pleasure craft. The vast majority of courts have applied the Act to cover pleasure craft. There can be no question that "vessel" includes pleasure craft except in the minds of those who would rewrite statutes contrary to their legislative intent and plain meaning of the words.



**B. The Limitation Of Liability Act Provides A Separate Basis For Jurisdiction.**

**1. The Act is Not Tied to The Nexus Requirement.**

The Seventh Circuit, while acknowledging that the scope of limitation of liability was extended by §189 to include non-maritime torts, seems to have confused certain fundamental concepts.

First, limitation of liability is a statutory creation first established in 1851. *Norwich Co. v. Wright*, 80 U.S. 104, 20 L.Ed. 585 (1872); *The Hamilton*, 207 U.S. 398, (1907). This Court has recognized that the statutory grant of jurisdiction must be broadly applied.

> "But this limitation of liability proceeding differs from the ordinary admiralty suit, in that by reason of the statute and rules, the court of admiralty has power (*Providence & N.Y.S.S. Co. v. Hill Mfg. Co.*, 109 U.S. 578, 27 L.Ed. 1038, 3 S.Ct. Rep. 379, 617) to do what is exceptional in a court of admiralty — to grant an injunction, and by such injunction bring litigants, who do not have claims which are strictly admiralty claims, into the admiralty court (Benedict, *Admiralty*, 5th ed. §70, note 97)".

*Hartford Accident & Indemnity Co. v. Southern Pacific*, 273 U.S. 206, 218; 45 S.Ct. 357, 360 (1926).

"The limitation extends to tort claims even where the tort is non-maritime." *Just*, supra at 383.

> "In this case the statutes of the United States have enabled the owner to transfer its liability to a fund and to the exclusive jurisdiction of the admiralty, and it has done so. That fund is being distributed. In such circumstances all claims to which the admiralty does not deny existence must be recognized, whether admiralty liens or not. This is not only a general principle (*Andrews v. Wall*, 3 How, 568, 573, 11 L.Ed.

729, 731; *THE J.E. RUMBELL*, 148 U.S. 1, 15; 37, 13 S.Ct. 498; L.Ed. 345, 348; Admiralty Rule 43; *THE GALAM*, 2 Moore P.C.C.N.S. 216, 236), but is the result of the statute which provides for, as well as limits, the liability, and allows it to be proved against the fund (*THE ALBERT DUMOIS*, 177 U.S. 240, 260; 20 S.Ct. 595, 44 L.Ed. 751, 762. See *Workman v. New York*, 179 U.S. 552, 563, 21 S.Ct. 21, 245 L.Ed. 314, 321).

*THE HAMILTON*, supra at 406.[8]

Second, this Court has the power "to continue the development of this (admiralty) law within the limits of the Constitution. *Romero*, supra at 361. Statutes should not be rewritten, and as the Court recognized in *Executive Jet*, this Court's decision was confined to situations where there was no legislation to the contrary.

Clearly, then, as long as the statutory prerequisites are met, there is admiralty jurisdiction under 46 U.S.C. §183 *et seq.*: (1) the structure seeking the benefit of the Act must be a "vessel" within the meaning of §§183 and 188(a); and, (2) the liabilities must exceed the value of the owner's interest in the vessel. All of these prerequisites have been met here. Appellant contends that the owner's right to limit liability is distinct from the issue of whether the claimants have a right to recover for a tort in admiralty. The Limitation of Liability Act created a species of admiralty jurisdiction, distinct from the general admiralty jurisdiction in tort, to which the "maritime nexus" test of *Executive Jet* is inapplicable.

[8] Following the lead of the Supreme Court other cases have confirmed the jurisdiction of admiralty courts in limitation cases where the claims asserted were non-maritime. *THE ATLAS NO. 7*, 42 F.2d 480 (S.D.N.Y. 1930); *THE WICHITA FALLS*, 15 F.Supp. 612 (S.D. Tex. 1936); *Tracy Towing Line v. Jersey City*, 105 F.Supp. 910 (D.N.J. 1952); *The City of Bangor*, 13 F.Supp. 648 (D. Mass. 1936); *In Re Pennsylvania R. Co.*, 48 F.2d 559 (2d Cir. 1931); *In Re Highland Nav. Corp.*, 24 F.2d 582 (S.D.N.Y. 1927); *THE No. 6*, 241 Fed. 69 (2d Cir. 1917). In fact, the rule is so well established that Gilmore and Black say:

> "The hornbook law of matter today is that §189: (1) extended the Limitation Act to cover non-maritime claims. . ."

Gilmore and Black, *The Law of Admiralty*, supra at p. 846.

The Ninth Circuit has noted:

> "The Supreme Court upheld the Act in *Richardson v. Harmon*, supra, even though it considered the Act as an extension of admiralty jurisdiction to theretofore non-maritime torts."

*United States v. Matson Nav. Co.*, 201 F.2d 610 (9th Cir. 1953).

Under all the foregoing authorities it is clear that the Limitation Act itself confers broader *statutory* jurisdiction than would exist solely under an analysis of *constitutional* jurisdiction. The District Court erred in failing to recognize this crucial distinction.



**2. According to *Richardson v. Harmon*, 222 U.S. 96 (1911) §189 of the Limitation Act established a Basis of Admiralty Jurisdiction Separate From Admiralty Jurisdiction in Tort.**

Congress, by enacting 46 U.S.C. §183, *et seq.* to enable vessel owners to limit their liability, supplemented the federal court's admiralty jurisdiction in tort. This has not always been true. After Congress first passed the Limitation Act in 1851, it was considered that the Act "embraced liabilities for maritime torts, but excluded both debts and liabilities for non-maritime torts." See *Richardson*, supra at 103. However, in 1884, Congress amended the Act by adding §189, which provides:

> The individual liability of a shipowner shall be limited to the proportion of *any or all debts and liabilities* that his individual share of the vessel bears to the whole; and the aggregate liabilities of all the owners of a vessel on account of the same shall not exceed the value of such vessels and freight pending:

> *Provided*, that this provision shall not prevent any claimant from joining all the owners in one action; nor shall the same apply to wages due to persons employed by said shipowners. June 26, 1884, c. 121, §18, 23 Stat. 57 (emphasis added).

*Richardson* was the first case in which this Court considered the meaning of §189. The vessel owner in *Richardson* sought to limit the liability arising out of an allision between his vessel and the abutment of a railway drawbridge. At that time, admiralty courts had no jurisdiction in tort over the damage communicated from ship to shore, and the district court accordingly dismissed the limitation petition for want of admiralty jurisdiction.

This Court reversed, holding that the 1884 amendment expanded the scope of the liabilities subject to limitation to include "all claims arising out of the conduct of the master and crew, *whether the liability be strictly maritime or from a tort non-maritime . . .*" 222 U.S. at 106, 32 S.Ct. at 30 (emphasis added). The claimants argued that Congress' specification that limitation was open to "any and all debts and liabilities that his individual share of the vessel bears" was only meant to encompass obligations *ex contractu* and not non-maritime liabilities in tort. This Court rejected this argument, starting that "the addition of the words 'and liabilities' would be tautology unless meant to embrace liabilities not arising from 'debts.'" *Id.* at 222 U.S. at 104, 32 S.Ct. at 29. According to the Court, "We therefore conclude that the section in question was intended to add to the enumerated claims of the old law 'any and all debts' not theretofore included." *Id.* 222 U.S. at 106, 32 S.Ct. at 30.

The conclusion is inescapable that because the right to limitation under §189 does not depend on the maritime nature of the *liability*, jurisdiction under the Limitation



Act is *not* merely coextensive with the general admiralty jurisdiction in tort. According to *Richardson's* interpretation of §189, a federal court's admiralty jurisdiction in tort and its admiralty jurisdiction under the Act are necessarily two separate species of admiralty jurisdiction, the latter extending jurisdiction to any and all liabilities arising out of the conduct of the vessel.

Everett Sisson has found only three cases subsequent to *Richardson* which have considered the application of §189 to non-maritime, or allegedly non-maritime, torts which occurred upon or in relation to navigable waters. In two of those cases, the courts followed *Richardson* and held that the Limitation Act applied to non-maritime torts. *Petition of Colonial Trust Co.*, 124 F.Supp. 73 (D. Conn. 1954); *The Trim Too*, 39 F.Supp. 271 (D. C. Mass. 1941). This case is the third.

The *Trim Too* involved a 48 foot yacht which exploded while in dry winter storage in Marblehead, Mass. The owner brought a petition to limit his liability, and the claimants moved to dismiss for lack of admiralty jurisdiction because the explosion had occurred on land. The court denied the motion to dismiss holding that the Limitation Act applied to non-maritime torts. According to the court, it was clear from §189 that Congress had amended the Limitation Act to further encourage shipping interests by "removing the restrictions on the character of the liabilities against which limitation might be asserted." 39 F. Supp. at 273. Such an interpretation was supported by *Richardson*, the court stated, for in that case the Supreme Court settled the principle that "admiralty jurisdiction extends to non-maritime torts in proceedings to limit liability." *Id.*

The *Trim Too* court also relied upon the then current edition of Benedicts' authoritative treatise on admiralty,

which cited *Richardson* and asserted that the Limitation Act provided an independent basis of admiralty jurisdiction:

> Proceedings by vessel owners to limit their liability as permitted by the Acts of Congress relating thereto are within the general maritime law and admiralty jurisdiction, and form an independent head of jurisdiction without regard to whether the claims limited against are such as might be sued upon the admiralty or not. Benedict on Admiralty, 6th Edition, Volume 1, Page 332; 5th Edition, Volume 1, Page 181.

*Id.* The current edition of Benedict is identical. I *Benedicts' on Admiralty* §248 (6th Edition 1986) (citing *Richardson*, *The Trim Too*, and *Colonial Trust Co.*).

*Colonial Trust* was a case remarkably similar to *The Trim Too*. In *Colonial Trust*, the owner of a 25 foot pleasure yacht sought to limit his liability when his vessel exploded while in dry winter storage in Branford, Connecticut. The court denied the claimants' motion to dismiss for lack of admiralty jurisdiction, quoting the paragraph above from Benedict, holding that "the statute should be liberally construed to encourage the building, maintenance and operation of sea-going vessels, and it applies to non-maritime as well as maritime torts. 124 F.Supp. at 75. *See also*, *Just v. Chambers*, 312 U.S. 383, 386, 61 S.Ct. 687, 690 (1941), reh. den. 312 U.S. 716 (1914) ("The Limitation Act extends to tort claims even when the tort is non-maritime"); *Tracy Towing Line, Inc. v. Jersey City*, 105 F.Supp. 910, 913 (D.N.J. 1952) ("The Court has jurisdiction of a proceeding to limit liability even where the tort is non-maritime in character"); Gilmore & Black, *The Law of Admiralty* 37-40 (2nd Ed. 1975) ("The hornbook law of the matter today is that §189 . . . extended the Limitation Act to cover non-maritime claims").



Despite the clear import of these decisions and authorities to the contrary, the Seventh Circuit in the present limitation proceeding dispensed with *Richardson v. Harmon*, in a most summary fashion.

### 3. The *Executive Jet* Decision Did Not Change The Jurisdictional Effect of §189 of The Limitation Act as Established by *Richardson v. Harmon*.

The decision of this Court in *Executive Jet* establishing a "maritime nexus" test in addition to the traditional "situs" requirement for admiralty jurisdiction in tort did not change the meaning placed upon §189 of the Limitation Act by the Court sixty years earlier in *Richardson v. Harmon*. The Court's sole concern in *Executive Jet* was the scope of a federal court's admiralty jurisdiction *in tort* under 28 U.S.C. 1333(1), as this was the ground of jurisdiction invoked in that case. *Id.* at 409 U.S. at 251, 93 S.Ct. at 496.

However, the rule formulated by the Court in *Executive Jet* affects the rule of *Richardson* only if *Richardson* was a case which decided some aspect of admiralty jurisdiction in tort. On the contrary, as noted above, *Richardson expressly* held that the Limitation Act was intended by Congress to apply to maritime and non maritime torts. 222 U.S. at, 106, 32 S.Ct. at, 30. *Richardson* did *not* hold that §189 of the Act effectively expanded admiralty jurisdiction in tort to cover injuries which originated on navigable waters but were consummated on land. Rather, the *Richardson* Court construed an Act of Congress as providing a separate source of admiralty jurisdiction which defendant shipowners might invoke irrespective of the maritime nature of the liability sought to be limited.

Moreover, *Executive Jet* did not propound jurisdictional prerequisites for all species of admiralty jurisdiction. For

instance, the maritime nexus test does not apply to admiralty jurisdiction in contract. Yet most importantly, the Court's express holding was "*in the absence of legislation to the contrary*, there is no federal admiralty jurisdiction over aviation tort claims arising from flights by land-based aircraft between points within the continental United States." 409 U.S. at 274, 93 S.Ct. at 507, 34 L.Ed.2d at 471. Clearly, this Court recognized that its new test did not apply to Congressional legislation which conferred additional jurisdiction in admiralty.

The Court cited a specific example of such jurisdictional legislation: the Death on the High Seas Act (DOHSA), 46 U.S.C. §§761-768.[9] In a footnote, the Court indicated that jurisdiction would "clearly" lie in a federal admiralty court when an aircraft crashed on the high seas beyond a marine league from the shore of a state:

> Of course, under the Death on the High Seas Act, a wrongful death action arising out of an airplane crash on the high seas beyond a marine league from the shore of a state may clearly be brought in a federal admiralty court.

409 U.S. at 271 n.20, 93 S.Ct. at 506 n.20, 34 L.Ed.2 at 469 n.20.

[9] §761 of DOHSA provides:

> Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decendent's wife, husband, parent, child, or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued.



The clear import of this footnote is that a federal court, sitting in admiralty, has jurisdiction over a wrongful death claim in an aviation accident on the high seas simply by virtue of it having occurred over one marine league from the shore of a state. Because of the legislative grant of jurisdiction, it does not need to satisfy a maritime nexus test. Moreover, the Court postulated that *in the absence of DOHSA*, a sufficient relationship to traditional maritime activity might nevertheless, be found in an aviation accident upon the high seas because the aircraft "would be performing a function traditionally performed by waterborne vessels." *Id.* The Fifth Circuit recognizes the independence of DOHSA actions from the *Executive Jet* nexus test. *Smith v. Pan Air Corp.*, 684 F.2d 1102, 1109 (5th Cir. 1982).

Because the Supreme Court expressly held that "legislation to the contrary" was beyond the scope of its decision in *Executive Jet*, the Seventh Circuit was simply incorrect in finding petitioner's reliance on *Richardson* "misplaced." Section 189 is jurisdictional *legislation* and not constrained by this Court's holding in *Executive Jet*.

#### 4. The Admiralty Extension Act Is Not A Codification of *Richardson v. Harmon* and Does Not Change The Meaning Of §189 Of The Limitation Act.

The Seventh Circuit asserted that the Extension of Admiralty Jurisdiction Act 46 U.S.C. §740 eliminated the need for the rules in *Richardson*.[10] Pet. App. 16a.

[10] 46 U.S.C. §740 provides in relevant part:

> The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury to person or party caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land.

If this statement is taken at face value, it means essentially that *Richardson* and the Extension Act are equal in meaning. In other words, the court implies that *Richardson* held torts caused by a vessel on navigable waters are within admiralty jurisdiction in tort notwithstanding that such injury is consummated on land. *Richardson* did in fact involve damage to a structure on land caused by a vessel. It did not, however, extend the general admiralty jurisdiction *in tort* over that damage: it found a basis for jurisdiction in the meaning of the Limitation Act.

Subsequent to *Richardson*, the type of tort involved in that case *remained* outside of the general admiralty jurisdiction in tort. The same year as the *Richardson* decision, the Court handed down *Martin v. West*, 222 U.S. 191, 32 S.Ct. 42, 56 L.Ed 159 (1911), which held precisely that there was no admiralty jurisdiction when a negligently operated ship on navigable waters collided with a bridge. In fact, the legislative purpose of Congress' enactment of §740 was to overrule *Martin*, not codify *Richardson*, and extend admiralty jurisdiction *in tort* to such cases. *Adams v. Harris County, Texas*, 316 F.Sup. 939, 941 (1970); Sen. Rep. No. 1593, 1948 U.S. Cong. & Adm. News p. 1898. To say that §740 "codified" *Richardson* is to miss the point of both *Richardson* and 46 U.S.C. §740. If *Richardson* and §740 have equal meaning, then §740 was unnecessary and the Supreme Court handed down mutually inconsistent decisions in the same year.

Rather, the meaning of *Richardson* is not to be found in the particular fact pattern before the Court, but in the statutory language of §189. In §189, Congress was concerned with a right to limitation of liability more extensive than the right to recover for a tort in admiralty; whereas in 46 U.S.C. §740, it was simply concerned with a partial extension of admiralty jurisdiction in torts which



were otherwise only cognizable in admiralty through their statutorily mandated inclusion in a limitation of liability proceeding. Thus, there is a fundamental jurisdictional distinction between the right of a shipowner to seek limitation and the right of the claimant to sue in admiralty reflected in the difference between *Richardson* and *Martin*.

### 5. *Richardson v. Harmon* Must Not Obscure the Impact of the Fire.

While the interplay between the Limitation Act and *Richardson* is important to an analysis of the scope of jurisdiction under the Act, it must not obscure the fact that the amount of damages to other boats in this case far exceeded the damage to the dock. The fire did damage the dock, but that should not be the only focus here. The right to limitation for the claims of other vessel owners is also sought by the Petitioner, and those claims have nothing to do with 46 U.S.C. § 740 and the Seventh Circuit's mistaken notion that §740 had eliminated the need and reason for the rule in *Richardson* Pet. App. 16a.

### 6. This Court Need Not Reconsider Its Opinion in *Richardson v. Harmon*.

This Court's decision in *Richardson* held that district courts may take jurisdiction over non-maritime tort claims brought in limitation of liability proceedings. This is the correct holding as, the basis for that holding, the 1884 amendment to the Limitation of Liability Act, is still the law of the land in 46 U.S.C. §189. *Richardson* is also consistent with this Court's decision in *Executive Jet*, because the latter decision carved out an exception for the application of the nexus standard where there was "legislation to the contrary". 409 U.S. at 268, 274 and n.26.

The Petitioner does not believe that the basis for this Court's decision in *Richardson* is subject to question. This Court read the original Act and the 1884 amendment correctly. The additional language, added in the 1884 amendment ("all debts and liabilities") was not a restatement of the prior language, but clearly shows that Congress intended to make limitation available to vessel owners in *all* cases of loss and injury, contract, tort or otherwise.

The Extension of Admiralty Jurisdiction Act 46 U.S.C. §740 did not diminish the importance and correctness of *Richardson*. The main thrust of that Act is to allow persons or property to claim for damages or injury caused by a vessel when such damage or injury is consummated on land. It does not deal with limitation of liability. Section 189, as interpreted by *Richardson*, is more broad in its scope as it applies to "all debts and liabilities" of a vessel owner and is not limited to cases of "damage or injury" as provided under 46 U.S.C. §740. While this court may have been concerned in *Richardson* with artificial limitations on admiralty jurisdiction arising from the locality test, the clear meaning of the language in §189 has not changed.

The Seventh Circuit also relied on the fact that the original purpose of the Limitation of Liability Act was to encourage shipbuilding. However, as discussed above, the majority of courts and commentators have all concluded that the Limitation of Liability Act applies to "all vessels" which would include recreational craft such as the M/V ULTORIAN. Also, this Court has eliminated the importance of commercial activity to a determination of admiralty jurisdiction in its opinion in *Foremost*. Now the test is whether the claim arises from a wrong having a significant relationship to traditional maritime activity and not whether the concerned interests are commercial.



Finally, the Petitioner does not believe that state interests will be jeopardized by the continued adherence to *Richardson*. This Court has long recognized that admiralty and maritime issues are issues which should be within the exclusive provence of federal courts. So long as there is a relationship with admiralty and maritime interests, federal jurisdiction should be available to a vessel owner.

## CONCLUSION

The Petitioner urges this Court to reject the restrictive interpretation of *Foremost* by the Seventh Circuit Court of Appeals and reverse its opinion. The grant of admiralty and maritime jurisdiction should be broadly construed so as to include torts or wrongs occurring on navigable waterways involving watercraft or artificial contrivances which are used or capable of being used for transportation on water. Only in this fashion will there be a uniform maritime law applicable to all vessels whether operating in commerce or for pleasure.

The Petitioner also urges this Court to uphold the majority view and find that the Limitation of Liability Act is available to recreational craft and provides a separate and independent basis for admiralty jurisdiction. In this regard, *Richardson v. Harmon* should not be reconsidered, but viewed as a correct interpretation of the statutory language in the amendment to the Limitation of Lia-

bility Act to include all liabilities of "all vessels". *Richardson* also found that the Limitation of Liability Act afforded a separate and independent basis for jurisdiction.

Respectfully submitted,

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